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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 759

HUGO V. LOEWI, INC., A CORPORATION,
Petitioner,

vs.

FRED GESCHWILL,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Hugo V. Loewi, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above case on January 31, 1951 (R. 551).

Opinions Below

The Memorandum Decision of the District Court (R. 33) is unreported. The opinion of the Circuit Court of Appeals is reported in 186 Fed. 2d 849 (R. 527).

Jurisdiction

The judgment of the Court of Appeals was entered on January 31, 1951 (R. 551). A petition for rehearing was

denied on April 18, 1951 (R. 552). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. Whether under the Uniform Sales Act a seller may maintain an action for the price where the goods tendered do not meet contract specification.

2. Whether under the Uniform Sales Act a seller may maintain an action for the price where the contract provides that in a case of breach the measure of damages shall be the difference between market price and contract price.

Statute Involved

The pertinent provisions of the Uniform Sales Act are printed in Appendix A.

Statement

This and a companion case, *Hugo V. Loewi, Inc.* v. *Smith,* involve the same important issues, the rights of buyer and seller under a standard hop sale contract. For the sake of brevity reference here will at times be made to the Petition for Certiorari filed this same day in that case.

The petitioner, Hugo V. Loewi, Inc., a New York corporation, was the buyer under a typical hop sale contract. The respondent, the seller, is an Oregon hop producer. The contract of sale was entered into on August 18, 1947 (R. 7-16). It made provision for quality (R. 8), price (R. 9), picking advances (R. 11), and measure of damages (R. 13).

On August 27, 1947 the buyer advanced $4,000 (R. 98, 85) to the seller to enable him to harvest his crop. This he did, and forwarded samples thereof to the buyer in New York (R. 100, 295). Upon their receipt the petitioner

advised his Oregon representative that the hops were blighted and not acceptable (R. 85, 373). Further samples were taken (R. 296, 297, 347), and the seller notified that the hops were not of contract quality (R. 373). Formal rejection was made on October 30, 1947 (R. 85).

Upon rejection the seller commenced this action for the contract price in the Circuit Court of the State of Oregon (R. 2, 7, 16). The action was removed to the United States District Court for the District of Oregon (R. 20, 21). Resale was permitted by the stipulation of the parties after this action was commenced (R. 127, 128, 132, 413). The price brought on resale was approximately one-fourth of the contract price (R. 41).

The contract involved hops

> "not affected by spraying or mold, but of prime quality in sound condition, of good color, fully matured, cleanly picked, free from damage by vermin, properly dried, cured and baled, and in good order and condition." (R. 8)

The trial court did not find the hops of prime quality. Nor did it find the hops unaffected by mold (R. 35-41). It found instead that the hops were "merchantable" (R. 39). It found, too, that the hops as delivered were no more blighted or mildewed than when the buyer contracted to purchase or when it elected to make its advance (R. 39).

The contract also provided

> "that upon the breach of the terms of this contract by either party, the difference between the contract price of said hops and the market value thereof at the time and place of delivery shall be considered and is hereby agreed to be the measure of damages." (R. 13).

The trial court held that under Oregon law, the measure of plaintiff's recovery was the amount due under the contract, less, of course, the advance payment (R. 42).

On appeal, the court below affirmed the judgment of the District Court, emphasizing that the picking advance was made with the buyer's knowledge that the hop crop showed some mildew.

While the appeal in the instant case was pending, *Steiner* v. *Hill*, 52 Or. Adv. 57, 226 Pac. 2d 307 (Jan. 17, 1951) was decided in the Supreme Court of the State of Oregon. There, as here, the dispute involved the standard hop sale contract. There, too, the hops were mildewed and blighted. The buyer instituted action to recover its picking advance. The seller counterclaimed for the price on the theory that the plaintiff by making advances with the knowledge that the hops on the vine showed mildew waived contract specifications concerning quality. The Oregon Supreme Court held, however, that the seller could not maintain his counterclaim for price. Judgment was entered for the buyer.

The buyer in the instant case petitioned the Court of Appeals for a rehearing. It was denied on April 1, 1951, Judge Pope dissenting (R. 552).

Meanwhile, the seller in the *Steiner* case petitioned the Supreme Court of the State of Oregon for a rehearing on the basis of the decision in the court below. This was denied on April 25, 1951.

The parties to this action, by the terms of the contract, provided that in case of breach by either party the remedy of the aggrieved party was an action for damages for the difference between market and contract price (R. 13). The trial court permitted recovery of the price. The court below sustained this recovery on the theory that the contractual measure of damages was not the exclusive remedy available to the seller.

Specification of Errors to Be Urged

The Court of Appeal erred:

1. In holding that under the Uniform Sales Act a seller may maintain an action for the contract price where the goods tendered do not meet contract specification;

2. In holding that under the Uniform Sales Act a seller may maintain an action for the price where the contract provides in case of breach the measure of damages should be the difference between the market price and contract price;

3. In applying the doctrine of substantial performance to a contract for the sale of goods;

4. In affirming the judgment of the District Court.

Reasons for Granting the Writ

1. The decision of the Court of Appeals is in direct conflict with the recent decision of the Supreme Court of Oregon in *Steiner* v. *Hill,* 52 Or. Adv. 57, 226 Pac. 2d 307 (Jan. 17, 1951), rehearing denied April 25, 1951.

In the *Steiner* case the seller tendered hops which were mildewed and blighted. Hops mildewed and blighted were tendered in the instant case (R. 39). Both contracts call for hops not affected by mold, and are alike in all material respects. In the one case the Supreme Court of Oregon denied recovery because the hops were mildewed. In the other, the Court of Appeals has permitted recovery of the contract price on the theory that the tender of mildewed hops constituted substantial performance of the contract. Upon the fundamental principle involved, the two courts are in irreconcilable conflict.

2. The decision of the Court of Appeals is in direct conflict with that of the Supreme Court of Oregon in *Daniels* v. *Morris,* 65 Or. 289, 130 Pac. 397, 132 Pac. 958.

The question there involved was the measure of damages. The contract provided that it should be the difference between the contract price and the market value of the kind and quality of the hops specified by the contract. The court limited the seller to this amount. In this case, too, the measure of damage provided is the difference between the contract price and the market price. The court below permitted recovery of the contract price.

3. The doctrine that a contract for the sale of goods of certain specifications can be satisfied by the tender of goods which do not meet the specifications but which the court holds substantially conform to these specifications, and the doctrine that the remedy of either party in the event of breach fixed specifically by the terms of the contract is not exclusive, are revolutionary.

4. The hop growing industry constitutes a major segment of the economy of the Pacific Coast, particularly of the States of Oregon and Washington. The farmers who raise crops are for the most part unable to finance the planting, growing and harvesting of the crops. The dealers advance tremendous sums to the growers for that purpose and enter into contracts for the purchase of crops when finally harvested.

The type of contract in general use, such as the one involved in the instant case, covers every conceivable situation which knowledge and experience can foresee. Its purpose is to fix the rights and remedies of the parties in all circumstances. The decision of the Court of Appeals has created uncertainty where none previously existed. This is harmful to both seller and buyer. The conflict between the Supreme Court of Oregon and the Court of Appeals should be corrected.

Argument

The petitioner respectfully refers to the argument submitted this day in support of the petition for writ of certiorari in *Hugo V. Loewi, Inc.* v. *Kilian W. Smith.*

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR B. HYMAN,
Counsel for Petitioner.

KERR & HILL,
Of Counsel.

APPENDIX A

Section 71 of the Uniform Sales Act, Section 71-171, O.C.L.A.:

> "Where any right, duty or liability would arise under a contract to sell or a sale by implication or law, it may be negatived or varied by express agreement or by a course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale."

Section 64 of the Uniform Sales Act, Section 71-164, O.C.L.A.:

> "(3) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept."

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TEXT BOOKS

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Restatement of Contracts, § 246 8

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